United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1469

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

DOCKET NO. 76-1469

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

V.

HOWARD E. HAWLEY

DEFENDANT-APPELLANT

BRIEF FOR DEFENDANT-APPELLANT

HOWARD E. HAWLEY

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RULE OF EVIDENCE INVOLVED

Federal Rule of Evidence 609(a)

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

* * * * * * *

STATEMENT OF THE ISSUES

1. WHETHER THE EVIDENCE IS SUFFICIENT TO SUSTAIN A CONVICTION FOR LARCENY.

2. WHETHER THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF THE APPELLANT'S PRIOR, SIMILAR CONVICTION FOR THE PURPOSE OF IMPEACHING HIS CREDIBILITY AS A WITNESS.

STATEMENT OF THE CASE

This direct criminal appeal arises from a judgment of sentence imposed September 27, 1976, after a one-day jury trial in the District of Connecticut, U.S. District Judge Jon O. Newman presiding. App. 8. Howard E. Hawley, Jr., the appellant, was convicted of violating 18 U.S.C. §2113(b) (one count) by stealing money from a federally insured bank where he occasionally worked as a custodian. App. 6. The trial judge denied post verdict motions for judgment of acquittal or a new trial. App. 7. Timely notice of appeal was filed. App. 5. Execution of the sentence has been stayed pending appeal.

STATEMENT OF FACTS

After working at the drive-up window of the Whalley Avenue branch of the Connecticut Bank & Trust Company on Saturday morning, December 13, 1975, a teller neglected to return to the vault over $7,000 which she had taken from her cash drawer and placed, for her own peace of mind, in a cardboard box on the floor inside the window. Tr. 5-6,8. The branch manager testified that his Monday morning audit showed $7401 missing. Tr. 34-36. FBI Agent John Quinn reported that he recovered $3010 bundled in money wrappers from the outside rear stairs of the bank, leading to the basement, when he searched the building that morning. Tr. 89-91. The bank was federally insured. Tr. 28-30. There was no indication of forceable entry over the weekend, so suspicion naturally focussed on those with legitimate access to the bank. Among these were the cleaning contractor, Leroy Umstead, and the members of his crew. Umstead had a key, Tr. 65, and he let himself and two others, Willie Ransom and the appellant, into the bank to clean it between 6 and 8:30 a.m. Monday. Tr. 54-55. All three testified at the trial, and each denied taking any money or seeing either of the others take any money. Tr. 65-66, 161 (Umstead); 84-86 (Ransom); 132-33, 145, 148, 150 (Hawley).

The Prosecution Case

One of the money wrappers from around the cash found by Agent Quinn on the bank's back stairs yielded a latent fingerprint of the appellant's left thumb. Tr. 97. Umstead, the head of the cleaning crew, testified that the appellant left the bank for a few minutes at the end of the work period (his apartment was only a five minute walk away, Tr. 131), then returned to the bank, and then went home again, where Umstead picked him up to go on to their next job. Tr. 56, 66-67, 70. Umstead and the appellant had planned to mate their dogs after work that morning; to facilitate this plan, the appellant brought his dog to the bank with him. E.g., Tr. 57, 133-34. The government's theory, presented through Umstead, was that the appellant "mysteriously" (Tr. 70) decided to take his dog home after cleaning the bank, rather than go through with the plan to mate the animals in Umstead's basement. */ The jury was asked to infer from these two points

*/ Whether the government claimed the appellant left the bank without telling Umstead or, on the other hand, after informing him of the change in plan is unclear. At first Umstead said the appellant "told me he was going to drop the dog off" and then went home to do so. Tr. 66. Later, however, Umstead flatly asserted that "There was nothing stated about the dog, period" until after the appellant returned. Tr. 81.

of circumstantial evidence that the appellant took the money, stashed half of it on the rear stairs of the bank, and took the rest home on one of the two occasions he left the bank after finishing his work. See Tr. 148-50.

The Defense

The appellant consistently maintained his innocence from the first day of investigation, on the witness stand and after conviction, at sentencing. He never made an inculpatory statement nor an inconsistent exculpatory one. Defense counsel urged that Umstead was most likely the guilty party and, in addition to attacking Umstead's credibility, presented circumstantial evidence of Umstead's guilt and the appellant's innocence.

Umstead's motive to falsely accuse the appellant was obvious. He was the other prime suspect. (Ransom, the third member of the cleaning crew, was in the basement all morning, nowhere near the stolen money. Tr. 55-56, 84.) On points both large and small, Umstead's testimony was critically impeached. For example, in response to the Court's questions, Umstead declared that while the men were in the bank cleaning, the appellant "told the dog to sit down out there until he came back," that is, "Out on the sidewalk or street." Tr. 78. Ransom and the appellant agreed, however, that the dog remained inside the outerdoors of the building while they cleaned. Tr. 134, 169. Even this small discrepancy was in his interest to main-

tain, for what industrial cleaning contractor would want to admit he allowed his employee to bring a dog onto the job? Far more important was the testimony about the fabulous sums of money Umstead said he or his crew found lying about the bank at various times and scrupulously turned in. Umstead said there were three such occasions: once, cash he believed to be around $60,000; second, more cash he heard and believed to be about $30,000; finally, "stamp money" in the amount of $15,000 or so. Tr. 155-58. Each time, he said, he brought it to the attention of branch manager Salafia. Tr. 158. Yet Mr. Salafia's version was very different. He said there were two occasions when the cleaning crew turned in money: once, a single, twenty dollar bill, another time some bags containing $3,000 to $4,000 in coin. Tr. 171-73. The issue was not whether Umstead's estimates of $60,000 and $30,000 were accurate, but whether an honest man trying to tell the truth under oath could confuse a lone twenty dollar bill with two multi-thousand dollar caches. The only kind of man who would tell such a story, the defense urged, was one with a grandiose and unjustified image of his own integrity, a man whose recollection is distorted and who cannot

limit himself to the simple truth.

Critical to the trial court's denial of the motion for judgment of acquittal (App.-Tr. 118, 121-22), was Umstead's testimony about the appellant's decision to leave the bank and take the dog home. This testimony, too, was made the subject of vigorous impeachment. The appellant testified that he took the dog home when he learned (for the first time) that there was to be a food store job later that morning. Tr. 134-35. He had finished his part of the bank work and was only five minutes from home, so it was entirely reasonable to take the dog home then. The appellant's testimony was the same as his earlier voluntary statement to FBI Agent David Cotton. Tr. 105-106. Moreover, Umstead originally told a different story from his trial testimony to Agent Cotton. That version was the same one the appellant gave: That Mr. Hawley took the dog home because he had just learned the crew would be going on (after the Goodyear Tire job) to clean a Pepperidge Farms store, where dogs were obviously not permitted. Tr. 72-76, 113-14.

The appellant also offered evidence consistent with Umstead's guilt.

He and Umstead were both on the main floor of the bank that morning. Tr. 55-56,84. And while Umstead admitted that during the time Mr. Hawley was on the main floor he was never out of Umstead's sight, Tr. 69, for the ten minutes or so that the appellant was gone home with his dog Umstead was on that floor alone, the last one to be there before the loss was discovered. Unstead was also alone on the bank's main floor for a period of time before the appellant arrived for work Monday morning. Tr. 133-34. (This point was consistent with the appellant's testimony that he not only did not take the money, he never saw the cardboard box left out by the teller. Tr. 150.) Moreover, only Umstead had a key to the bank, Tr. 65, and the testimony of the neighbor, Albert Rogers, who had seen Umstead's tan Ford van there before and knew it by sight, suggested that Umstead may have been at the bank alone on Sunday evening. Tr. 174-75.

The final element in the defense was the appellant's testimony in his own behalf. He related that in the course of his work he occasionally found money wrappers on the floor behind the various tellers' stations. When he found an unbroken one, he would pick it up and replace it on the counter. Tr. 132, 140-41. In this way, the defense contended,

the appellant could easily have touched the particular wrapper later used on some of the money carelessly left out by the teller on December 13. */ The Government's fingerprint expert agreed that no one could say when a fingerprint had been placed on a certain wrapper. Tr. 100-01. Finally, there was no evidence that after the incident the appellant, who was and is a welfare recipient, Tr. 138, engaged in any unusual spending. A prompt search of his apartment turned nothing up. Tr. 111-12.

Events at Trial

On the first day of trial, the prosecutor showed defense counsel a certified copy of an attempted burglary conviction of the appellant entered April 23, 1976, on account of an event which occurred on January 20, 1976, announcing that if the appellant took the witness stand, the Government would use the conviction to impeach his credibility. Accordingly, at

*/ The Government offered evidence designed to show that a person touching a money wrapper in its rack would not leave a fingerprint in the position of the appellant's. Tr. 15-19, 100. This testimony missed the mark, however, for the appellant's contention was that he never touched anything atop the rack or counter, Tr. 146, but rather that the wrapper with his fingerprint must have been one found on the floor on an earlier occasion and put up on the counter.

the opening of the defense case, counsel moved to exclude the conviction from evidence. App.-Tr. 125-27. After brief argument, the motion was denied. App.-Tr.127-28. Notwithstanding his representation that he "only want[ed] the conviction for credibility," App.-Tr. 127, the prosecutor used it on cross-examination only to imply motive. App.-Tr. 138-39. In arguing credibility to the jury, however, the prosecutor emphasized that the appellant was the only witness who was a convicted felon.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION FOR LARCENY.

The evidence against the appellant was entirely circumstantial and extraordinarily thin. It consisted solely of one fingerprint found on a wrapper around one of the four packets of money located and recovered on the back stairs of the bank during the FBI search, together with evidence that the appellant, unlike his two co-workers, left the bank premises alone for about ten minutes toward the end of the work session. A reasonable jury could not have found beyond a reasonable doubt from this evidence that the appellant took and carried away bank money, intending to steal it. The motions for judgment of acquittal under Fed. R. Crim. P. 29(a) and (c) should have been granted.

FBI Agent Elman Robinson, the fingerprint expert, testified that no one could say how long the appellant's print has been on the wrapper, nor whether it was impressed before or after the band was wrapped around the money. A fingerprint is no evidence of guilt unelss it was placed during the commission of the crime, Borum v. United States, 380 F.2d 595, 597 (D.C. Cir. 1967), and a jury may not properly find guilt unless there is evidence from which to infer that circumstance. For example, the government can attempt to demonstrate the absence of any legitimate oppor-

tunity for the defendant to touch the object in question and leave a print. See, e.g., United States v. Cary, 470 F.2d 469 (D.C. Cir. 1972) (prints on both sides of burglary victim's back door window); United States v. Jones, 433 F.2d 1107, 1108-09 (D.C. Cir. 1970) (on money box taken from inside laundromat machine); Stevenson v. United States, 380 F.2d 590 (D.C. Cir.), cert. denied, 389 U.S. 962 (1967) (burglar, a stranger to victims, touched objects which had remained in house for years); U.S. ex rel. Chiarello v. Mancusi, 288 F.Supp. 178 (S.D.N.Y. 1968) (Weinfeld, J.) (print inside vending machine broken into). This the government obviously could not do here, for the appellant, as a custodian in the bank, had an opportunity to touch unused money wrappers when he found them fallen to the floor. Indeed, the prospect of a legitimate touching by the appellant here is far greater than that in Hiet v. United States, 365 F.2d 504 (D.C. Cir. 1966), where the fingerprint in question was found on the inside of the vent window used by a car burglar to obtain access. There was no testimony that Hiet had touched the inside of the vent window of a parked car during the four days he had been in Washington before the day of the crime. Yet the Court of Appeals reversed, and Judge Prettyman wrote

in his separate opinion:

> There was no evidence that [the victim] locked his car when he left no valuable property in it. Hiet, wandering about the street or simply passing by, at a time other than the thirty-minute period critical in this case, may have pushed on the unlocked vent. . .
>
> Unquestionably the print raises a suspicion. But a suspicion, even a strong one, is not enough. . .
>
> . . . Without any evidence whatever connecting Hiet with the missing property, I think there is necessarily a doubt (more than a reasonable one, I think) that he took it and carried it away. The doubt is not a visceral or moral one, it is a doubt upon the record; the lack of essential proof creates the doubt as a legal matter.

Id. at 505-06. See also Borum, supra (prints found on jars in kitchen of burglarized house; no evidence of prior inaccessibility). Likewise, in United States v. Van Fossen, 460 F. 2d 38 (4th Cir. 1972), the court found insufficient evidence for the conviction of a man whose fingerprints were discovered on three separate counterfeiting devices seized from a print shop proved to have been used for counterfeiting. The court reversed because Van Fossen might have had occasion to touch the contraband while in the shop "on legitimate business." Id. at 41. The government's case here is much weaker, for the appellant had undisputed, not merely speculative access to money wrappers while working in the bank.

The evidence in this case could only be held sufficient, then, if the fact of the appellant's leaving the bank for ten minutes was adequate additional evidence to support a legitimate jury inference that he touched the money wrapper in the course of stealing that and other bundles of money. This single circumstance does not compare with the evidence found sufficient to give rise to such an inference in other cases. In Mikus v. United States, 433 F.2d 719, 727-28 (2d Cir. 1970), for example, this Court found sufficient evidence to support an armed bank robbery conviction where the defendant's fingerprint (along with a co-defendant's) was found on a paper bag used during the robbery and recovered from the get-away car. Like one of the robbers, Mikus had an Eastern European accent. Finally, he was shown to have falsely denied to the FBI knowing one of the co-defendants and to have fabricated an alibi, from which this Court concluded that the jury could have not only discredited his testimony on his own behalf, but also inferred consciousness of guilt. Similarly, in United States v. Robinson, No. 76-1153 (Nov. 1, 1976), slip op. 5913, this Court implicitly found sufficient (albeit "less than airtight," id. at 5927) evidence that an accused bank robber's fingerprint was found on the lighter of the get-away car, as corroborated by his identification by an accomplice

and his unexplained absence from work on the day of the crime. Id. at 5923. See also United States v. Griffin, 483 F.2d 957 (5th Cir. 1973) (fingerprint plus confession); United States v. Roberts, 481 F.2d 892 (5th Cir. 1973) (fingerprint, eyewitness identification and "the unexplained possession of a large amount of cash money." Id. at 894). These convictions were affirmed.

In none of the cases discussed about was the evidence corroborated by the fingerprint as slight or as ambiguous as that in this case. Rather, this case has more in common with several others in which a fingerprint and a single additional item of less-than-devastating evidence have been held insufficient to support a conviction. In United States v. Collon (Garside), 426 F.2d 939, 941-42 (6th Cir. 1970), a conviction was reversed where the defendant's fingerprint was found on the getaway car and the only other evidence was a weak identification. Accord, United States v. Nazarok, 330 F. Supp. 1054 (E.D.Pa. 1971). And in United States v. Corso, 439 F.2d 956 (4th Cir. 1971), the court reversed the conviction where the "defendant made credit purchases with cash down payments soon after the burglary had occurred," id. at 957, and his fingerprint was found on the matchbook used to

prevent the stairwell door to the bank from automatically locking as it was supposed to. (Indeed, Corso could not even testify to his whereabouts on the date of the burglary, and although he said he was with his brother part of that weekend, he did not call his brother as a witness.) Cf. also State v. Mayell, 163 Conn. 419, 311 A.2d 60 (1972) (car of which defendant was chauffeur was used in robbery, yielding his fingerprints; defendant disappeared without explanation for eight months beginning day of crime; reversed for insufficient evidence).

The government's case against the appellant, even in its most favorable light, was certainly no better than the cases against Nazarok, Garside, Corso or Mayell. All the witnesses, including Mr. Hawley, agreed that he brought his dog with him to the bank that morning. Umstead and the appellant agreed that they had a plan to mate their dogs after work at Umstead's home. All agreed that Mr. Hawley left for ten minutes or so shortly before 8:30 a.m. to take his dog back home, which was only a few blocks away. Umstead testified that the decision to take the dog back home was a surprise to him and seemed "mysterious." (The appellant, on the other hand, explained that Umstead had told him he could not bring the dog along to the Pepperidge Farms Food Store which they were to clean later that morning, and so, when he finished his work,

he took it home.) Moreover, he cooperated fully in the investigation in this case. Tr. 93-94, 111-12. He consistently maintained his innocence, and never made an inculpatory statement nor an inconsistent exculpatory one. He indulged in no spending spree, and nothing was found in the FBI search of his apartment that morning. Tr. 112. Cf. United States v. Van Fossen, 460 F.2d 38, 41 (4th Cir. 1972) (discussed above). There was no direct evidence of guilt and only the slightest circumstantial evidence. The most that can fairly be said for this evidence is that it might raise a suspicion in a juror's mind. But it falls far short of proof beyond a reasonable doubt that the appellant's fingerprint was placed on a certain money wrapper during the commission of a larceny. In no way can this single, equivocal circumstance, together with a fingerprint found where the defendant had a right to be, constitute proof beyond a reasonable doubt. The evidence was simply insufficient to support a jury finding of guilt. The conviction should be reversed and the case remanded for entry of a judgment of not guilty.

II. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF THE APPELLANT'S PRIOR CONVICTION FOR THE PURPOSE OF IMPEACHING HIS CREDIBILITY.

On January 20, 1976, about a month after the incident giving rise to this federal trial, the appellant was arrested near his home in New Haven attempting to break into a closed grocery store. He entered a plea of guilty on April 23, 1976, to attempted burglary in the third degree and was sentenced to six months suspended and two years' probation. This was a felony conviction, Conn.Gen.Stat. §§53a-103, 53a-51, and the permissible punishment exceeded one year. Id. §53a-35(a),(b)(4). At the opening of the defense case, counsel moved pursuant to Fed.R.Evid. 103(c) to prohibit the use of the conviction to impeach the appellant's credibility under Rule 609(a), the only purpose for which the prosecutor claimed he wanted to use it. The trial judge denied the motion on the ground that:

> I can't accept [the] argument [that the jury will infer that if he attempted the burglary then he must have committed the larceny] to preclude them in all situations. This is recent and it's not trivial and it seems to me it's not a basis to rule it unavailable to the government ....

App.-Tr. 127-28. In view of this ruling, counsel brought out the fact of conviction in the direct examination of the appellant. App.-Tr. 130-31. On cross-examination, the prosecutor referred to the conviction, but seemed to use it as evidence of motive, rather than to impeach credibility. See Fed.R.Evid. 404(b). App.-Tr. 138-39. In argument, however, the prosecutor declared that the appellant, alone among the witnesses, was a convicted felon. The denial of the appellant's motion to exclude the

conviction from evidence was reversible error under the circumstances of this case for two reasons. First, the trial judge did not properly apply Rule 609, although the issue was clearly presented to him in those terms. Second, in light of the weakness of the government's case and the similarity of the two offenses, the possibility of prejudice to the defendant outweighed the probative value of the prior conviction on the issue of credibility.*/

A. The Prior Conviction for Attempted Burglary Was Not Automatically Admissible Under Evidence Rule 609(a)(2), Because It Did Not Involve Dishonesty or False Statement.

The passage of the Federal Rules of Evidence, applicable to trials commencing after July 1, 1975, such as the appellant's, has altered many aspects of the law of evidence in federal courts, including the principles governing the use of prior convictions for impeachment. Under Rule 609(a) there are two grounds for admitting such convictions.**/ One is provided in Fed.R.Evid. 609(a)(2) and is automatic. The judge has no discretion to exclude a conviction if it involves "dishonesty or false statement, regardless of the punishment." Recognizing that the meaning of this phrase might be open to dispute, the House-Senate Conference

*/ The appellant did not waive this point by bringing out the conviction himself on direct examination. Unlike the "peculiar situation" in United States v. Mariani, 539 F.2d 915, 920-21 (2d Cir. 1976), the trial court ruled the prior conviction admissible for credibility, not for motive or the like, and the prosecutor did make use of the evidence on cross-examination and in his argument.

**/ For the text of the Rule, see page iv.

Committee made clear that this subsection of the rule applies only to a narrow class of offenses:

> By the phrase 'dishonesty and [sic] false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

H.Conf.Rep. 93-1597, 93d Cong., 2d Sess. (Dec. 14, 1974), reprinted in 4 U.S.Code Cong. & Adm. News 7051, 7103 (1974). This rule relating to crimen falsi effects two changes in the prior law of this Circuit. Cf. Kaufman v. Edelstein, 539 F.2d 811, 818 (2d Cir. 1976); United States v. Zubkoff, 416 F.2d 141, 143 (2d Cir. 1969), cert. denied, 396 U.S. 1038 (1970)(recognizing potential impact of new rules on prior evidence law). First, it eliminates the discretion to exclude such convictions recognized in United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969). Second, however, it creates a category different from any previously recognized by this Court of convictions which involve "dishonesty." In Palumbo, crimes of "stealing" were said to be "universally regarded as conduct which reflects adversely on a man's honesty and integrity." 401 F.2d at 274. Similarly, in United States v. DiLorenzo, 429 F.2d 215, 220 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971), the Court held that larceny as well as forgery "reflect on honesty and integrity and thereby on credibility." With the exception of DiLorenzo's forgery conviction, it seems clear that none of these crimes would now fall

within the special category reserved for convictions which necessarily involve untruthfulness. Their admissibility, like that of the appellant's attempted burglary conviction, would fall under the ambit of Rule 609(a)(1).

B. The Trial Judge Abused His Discretion Under Rule 609(a)(1) by Admitting Evidence of the Appellant's Prior Conviction.

Evidence Rule 609(a)(1) provides that evidence of a felony conviction other than crimen falsi is admissible "only if" the trial judge "determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."*/ The record does not demonstrate that the trial judge performed this weighing process, and, in any event, his ruling was an abuse of discretion.

1. Failure to Balance Prejudice Against Probative Value.

The trial judge overruled the motion to exclude the prior conviction without considering the particular arguments raised before him. The

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*/ In enunciating this test in the Rule, Congress rejected the less favorable standard formerly employed in this Court: that a conviction may be excludable if it "negates credibility only slightly but creates a substantial chance of unfair prejudice." United States v. DiAngelis, 490 F.2d 1004, 1009 (2d Cir.), cert. denied, 416 U.S. 956 (1974), quoting United States v. Palumbo, 401 F.2d 270, 273 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969). Compare Fed. R. Evid. 403; United States v. Robinson, No. 76-1153 (2d Cir., Nov. 1, 1976), slip op. 5913, 5925. That the quantum of prejudice sufficient to outweigh probative value under Rule 609, as finally adopted by the Congressional Conference, need be neither "substantial" nor "unfair" may be explained by the fact that the House, in its version of the Rule, would have forbidden such impeachment altogether, unless the conviction were in the nature of crimen falsi. H.Rep. 93-650, 93d Cong., 2d Sess. (Jud.Comm., Nov. 15, 1973), reprinted in 4 U.S.Code Cong. & Adm. News 7051, 7084-85 (1974).

prosecutor claimed the conviction was probative on the issue of credibility because it involved stealing and was similar to the crime charged. App.-Tr. 126-27. Defense counsel argued that the probative value was limited because the offense was not in the nature of crimen falsi and the danger of prejudice was great because of the generic similarity between attempted burglary and larceny. Id. The court, however, did not appear to consider any of these arguments. He declared that the possibility of prejudice does not operate to exclude evidence of convictions "in all situations," App.-Tr. 3, but he did not proceed to weigh the particular factors important in this case. Instead, the judge noted simply that the conviction was "recent" and "not trivial." Id. While these factors are clearly relevant, they were not the crucial ones in this case, as both counsel recognized. Because the trial court did not balance the important factors and thus did not exercise his discretion in the way that Rule 609(a)(1) requires, this Court should not defer overmuch to his ruling. Rather, this Court should examine the factors carefully itself, especially because the "case is, in other respects, a close one," as made clear in Point I of this Argument. United States v. Robinson, No. 76-1153 (2d Cir., Nov. 1, 1976), slip op. 5913, 5920 n.6.

2. Probative Value.

The proposition that every serious conviction reflects adversely on a defendant's credibility as a witness, while venerable, is of uncertain logic. United States v. Puco, 453 F.2d 539, 542-43 (2d Cir. 1971). In any event, Rule 609 suggests that all felonies are deemed to have some

probative value in this regard, although the value varies greatly and must be balanced carefully against prejudice. The government was clearly wrong, however, to suggest below that the appellant's prior conviction for attempted burglary gained probative value by virtue of its similarity to the offense for which he was on trial. See App.-Tr. 127. The inference the prosecutor must have been suggesting is precisely the forbidden one: that if the appellant did "it" before, he must be lying when he denies doing "it" this time. Cf. United States v. Puco, supra, 453 F.2d at 542 n.8. The probative value of this conviction was not especially strong, then, and this Court should consider with special care its prejudicial impact.

3. Prejudice.

"Reference to a defendant's criminal record is always highly prejudicial. The average jury is unable, despite curative instructions, to limit the influence of a defendant's criminal record to the issue of credibility." United States v. Puco, supra, 453 F.2d at 542. The danger of prejudice to the defendant in this case was especially great for two reasons. First, the offense to which he pleaded guilty formerly and the one for which he was on trial were very close in time and similar in nature. As the Puco Court noted:

> The potential for prejudice, moreover, is greatly enhanced where, as here, the prior offense is similar to the one for which the defendant is on trial. ... In view of the substantial likelihood of prejudice, any decision to permit impeachment by reference to convictions for crimes similar to the one for which a defendant is on trial requires particularly careful

> consideration by the trial judge of the probative value of the prior convictions.

Id. (citations and footnotes omitted). Indeed, this Court has specifically realized that even a prior conviction involving "fraud and stealing" -- and a fortiori one for attempted burglary in the third degree -- might be excludable if "similar to the ones for which the defendant were on trial." Id. at 543 n.12. This factor was given much too little weight here.

The potential for prejudice was also great in this case because the evidence of guilt was weak and the appellant's testimony in his own defense was crucial. As Judge Elfvin recently put it: "If ... the case were going to be determined quite substantially on the credibility of the defendant-witness, admission of earlier convictions would be highly prejudicial." United States v. Brown, 409 F.Supp. 890, 892 (W.D.N.Y. 1976). The truth of this observation is borne out by Kalven and Zeisel's famous study of The American Jury (1966). They found that where the prosecution's case is of "normal" strength but contains some contradictions, and the defendant takes the witness stand without the jury's learning he has a prior record, the rate of acquittal is 65%. All other things being equal, except that the jury learns of the defendant's prior record, the acquittal rate falls to 38%. Even where the prosecution's case is rated "very strong" and the defense case contains contradictions, the rate of acquittal drops from 21% to 12% when the jury learns of the defendant's prior record. Id. at 160. It cannot be gainsaid, then, that the prejudice to the defendant of the trial court's ruling was enormous.

4. The Proper Balance.

Appellant argues in Point I of the Brief that the government's evidence, even if his own were disbelieved, was insufficient. But even if the evidence were sufficient, this was certainly a close case, and the prejudicial impact on the defendant of impeachment by a prior similar conviction was especially great. Compare United States v. Zubkoff, 416 F.2d 141, 144 (2d Cir. 1969), cert. denied, 396 U.S. 1038 (1970). As this Court recently remarked:

> Appellate review is particularly important when the case is ... a close one, ... since then greater care must be exercised to ensure a rational verdict. ... Moreover, with all due respect to Judge Weinstein, whose treatise [states] that evidence [should] be given 'its maximum reasonable probative value and its minimum reasonable prejudicial value,' ... it can be argued with equal cogency, and in a criminal case with greater urgency, that, in the interests of 'more humane and rational trials,' courts should 'resolve all doubts concerning the balance between probative value and prejudice in favor of prejudice.'

United States v. Robinson, No. 76-1153 (2d Cir., Nov. 1, 1976), slip op. 5913, 5920 n.6, quoting Dolan, Rule 403: The Prejudice Rule in Evidence, 49 So.Cal.L.Rev. 220, 233 (1976). Robinson involved Rule 403, under which the prejudice must "substantially outweigh" probative value before evidence will be excluded. Under Rule 609(a)(1), on the other hand, as noted above, the balance need only tip slightly to the side of prejudice before exclusion is mandated.

With these principles in mind, this Court should find error in the trial court's denial of the motion to exclude the prior conviction from evidence, reverse the appellant's conviction and remand for a new trial.

CONCLUSION

The evidence of larceny was insufficient to sustain a criminal conviction, and the case should be remanded for entry of a judgment of not guilty. If this Court finds the evidence adequate, however, it should consider the prejudicial impact of the trial court's erroneous refusal to exclude evidence of the appellant's prior similar conviction and remand the case for a new trial.

Respectfully submitted,

December 6, 1976

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CERTIFICATE OF SERVICE

On December 6, 1976, I mailed two copies of this Brief and two copies of the Appendix in this case to Michael Hartmere, Esq., Assistant United States Attorney, New Haven, Connecticut, counsel for the appellee.